



FOI 21-29

18 November 2020

Phillip Sweeney  
Right to Know

By email: [XXXXXXXXXXXXXXXXXXXXXXXXXXXX@XXXXXXXXXXXX.XXX.XX](mailto:XXXXXXXXXXXXXXXXXXXXXXXXXXXX@XXXXXXXXXXXX.XXX.XX)

Dear Mr Sweeney,

**NOTICE OF DECISION MADE UNDER SECTION 23 OF THE FREEDOM OF INFORMATION ACT 1982 (CTH) (FOI ACT) WITH REASONS FOR DECISION PROVIDED UNDER SECTION 26**

**Applicant:** Phillip Sweeney

**Decision-maker:** Ann Quinlan, an authorised officer of the Australian Prudential Regulation Authority (**APRA**) for the purposes of subsection 23(1) of the FOI Act.

**FOI request:**

- (i) *A copy of the application letter to APRA for a “modification declaration” as set out in the letter to all trustees by Greg Brunner, signed by Nicole Smith (or other Directors) of PFS Nominees Pty Ltd (Transferor Trustee of the three “not-for-profit” funds) and NULIS Nominees (Australia) Ltd (Transferee Trustee) of the “for-profit” MLC Super Fund;*
- (ii) *A copy of the documented reasons that PFS Nominees Pty Ltd provided APRA as to why transferring members of the National Australia Bank Group Superannuation Fund A to another fund was in their “best interests” and not in breach of the governing rules of that fund;*
- (iii) *A copy of the documented reasons that PFS Nominees Pty Ltd provided APRA as to why transferring members of BHP Billiton Superannuation Fund to another fund was in their “best interests” and not in breach of the governing rules of that fund;*
- (iv) *A copy of the documented reasons that PFS Nominees Pty Ltd provided APRA as to why transferring members of Worsley Alumina Superannuation Fund to another fund was in their “best interests” and not in breach of the governing rules of that fund.” (FOI request).*

**My decision:** Refuse access to the documents specified in the Applicant's request under section 24A of the FOI Act.

## **MATERIAL FACTS**

1. On 4 October 2020, you made the FOI request by email under the FOI Act.
2. On 6 October 2020, APRA acknowledged receipt of the FOI request by email.
3. On 30 October 2020, APRA extended the decision date under section 15AA of the FOI Act until 23 November 2020.

## **EVIDENCE AND MATERIAL**

4. In making my decision, I have relied on the following evidence and material:
  - a) the Applicant's request received by APRA on 4 October 2020;
  - b) acknowledgment email from FOI Officer to the Applicant dated 6 October 2020;
  - c) email correspondence between APRA staff between 21 October – 5 November 2020;
  - d) relevant sections of the FOI Act; and
  - e) guidelines issued by the Office of the Australian Information Commissioner to date (**FOI Guidelines**).

## **REASONS**

5. APRA has conducted all reasonable searches of its records in order to identify all documents relevant to your FOI request.
6. I have decided to refuse the FOI request for access to the documents. My reason for the refusal is as follows:

### **Documents cannot be found, do not exist or have not been received**

7. Based on the information before me, APRA has taken all reasonable steps to locate the documents relevant to the request and I am satisfied that the documents do not exist. Accordingly, I refuse the FOI request for access to the documents under section 24A of the FOI Act.

## **RIGHTS OF REVIEW**

### **Application for Internal Review of Decision**

8. Under section 54 of the FOI Act, you have the right to apply for an internal review of the decision if you disagree with my decision. If you make an application for review, another officer of APRA will be appointed to conduct the review and make a fresh decision on the merits of the case.

9. Under section 54B of the FOI Act, you must apply in writing for a review of the decision within 30 days after the day the decision has been notified to you.
10. You do not have to pay any other fees or processing charges for an internal review, except fees and charges applicable for providing access to further material, if any, in the document released as a result of the review (for example, photocopying, inspection, etc).
11. No particular form is required to apply for review, although it is desirable (but not essential) to set out in the application, the grounds on which you consider that the decision should be reviewed.
12. Application for an internal review of the decision should be addressed to:
 

FOI Officer  
 Australian Prudential Regulation Authority  
 GPO Box 9836, Sydney NSW 2001  
 Telephone: (02) 9210 3000  
 Facsimile: (02) 9210 3411
13. If you make an application for internal review and we do not make a decision within 30 days of receiving the application, the agency is deemed to have affirmed the original decision. However, under section 54D of the FOI Act, APRA may apply, in writing to the Information Commissioner for further time to consider the internal review.

**Application for review by Information Commissioner**

14. Under section 54L of the FOI Act, you have the right to apply to the Information Commissioner for a review of the original decision or a review of a decision made on review.
15. Any application must be in writing and must give details of an address where notices may be sent and include a copy of the original decision or the decision made on internal review.
16. An application for review by the Information Commissioner may be lodged in the following ways:

<b>Online</b>	Complete and lodge the online review form at: <a href="https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/">https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/</a>
<b>Post</b>	Director of FOI Dispute Resolution GPO Box 5218, Sydney NSW 2001
<b>Email</b>	<a href="mailto:foidr@oaic.gov.au">foidr@oaic.gov.au</a>
<b>Facsimile</b>	(02) 9284 9666
<b>Delivered in person</b>	Office of the Australian Information Commissioner Level 3, 175 Pitt Street Sydney NSW 2000

### **Application for review by Administrative Appeals Tribunal**

17. If the decision on review by the Information Commissioner is not to grant access to all of the documents within your request, you would be entitled to seek review of the Information Commissioner's decision by the Administrative Appeals Tribunal (**AAT**).
18. The AAT is an independent review body with the power to make a fresh decision. An application to the AAT for a review of an FOI decision does not attract a fee. The AAT cannot award costs either in your favour or against you, although it may in some circumstances recommend payment by the Attorney-General of some or all of your costs. Further information is available from the AAT on 1300 366 700.

### **Complaints to the Information Commissioner**

19. You may complain to the Information Commissioner concerning action taken by APRA in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. The Information Commissioner will conduct an independent investigation of your complaint.
20. You may complain to the Information Commissioner either orally or in writing, by any of the methods outlined above, or by telephone, on 1300 363 992.

Ann Quinlan  
FOI Officer  
Australian Prudential Regulation Authority  
Date: 18 November 2020

## ***FREEDOM OF INFORMATION ACT 1982***

### **24A Requests may be refused if documents cannot be found, do not exist or have not been received**

#### *Document lost or non-existent*

- (1) An agency or Minister may refuse a request for access to a document if:
  - (a) all reasonable steps have been taken to find the document; and
  - (b) the agency or Minister is satisfied that the document:
    - (i) is in the agency's or Minister's possession but cannot be found; or
    - (ii) does not exist.

#### *Document not received as required by contract*

- (2) An agency may refuse a request for access to a document if:
  - (a) in order to comply with section 6C, the agency has taken contractual measures to ensure that it receives the document; and
  - (b) the agency has not received the document; and
  - (c) the agency has taken all reasonable steps to receive the document in accordance with those contractual measures.